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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

JOHN GARGANO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Questions Presented.

I. Was it proper for the Court of Appeals to affirm petitioner's conviction on a theory that the burden of proof was on the defendant "to prove" that certain checks were loans (as he alleged) rather than income (as the government alleged), after the trial court had submitted the case to the jury on the theory that the government had the burden of proving that the checks were income rather than loans, and after the defendant had relied on that ruling in waiving his right to testify on his own behalf?

II. Was it proper for the trial court: to frighten the defendant's crucial exculpatory witness into pleading the Fifth Amendment; to allow the witness' blanket plea of the Fifth Amendment — even if "capricious," "frivolous" and absent "any basis" — without any probing of the basis of that plea; and then to instruct the jury that "either party" has the power to subpoena witnesses "if he chooses" — knowing full well that the defendant had no power to obtain his crucial witness' testimony in the face of the trial court's actions and absent a grant of defense witness immunity?

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Opinion Below.

The opinion of the Court of Appeals is unreported and appears as Appendix A. The order denying rehearing appears as Appendix B.

Jurisdiction.

This is a timely petition for certiorari to the United States Court of Appeals for the Second Circuit from a decision rendered on December 30, 1980 and a denial of rehearing rendered on March 10, 1981. Jurisdiction is conferred by 28 U.S.C. §§ 1254.

Constitutional and Statutory Provisions Involved.

UNITED STATES CONSTITUTION.

Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the wit-

nesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case.

I. Introduction.

Defendant, a respected businessman, has been convicted of tax evasion and sentenced to imprisonment for engaging in an entirely legitimate and common business transaction: obtaining interest-free loans as a form of untaxed compensation for referring business. The person lending him the money did not deduct the payment as an expense, and the defendant-recipient did not report the payments as income. The government had no evidence that the payments were income or that defendant believed they were taxable. Nevertheless, it prosecuted defendant, acknowledging that it had the burden of proving *both* that the payments were income and that the defendant believed them to be so. The defendant's crucial exculpatory witness was the man who made the payments and who treated them as loans by not deducting them as expenses. But the trial court frightened this witness into improperly invoking the Fifth Amendment by making the gratuitous comment to the prosecutor in open court: "I don't know why you didn't indict the two of them [defendant and the witness] and try them jointly, and just tell the jury to take their choice." When the witness then indicated that he had changed his mind and wanted to invoke the privilege, the trial court, instead of probing the basis for the claim, ruled that there need not be "any basis" and that he would sustain the defendant's invocation of the privilege even if it was "frivolous" and "capricious."

These serious issues and others — including the total insufficiency of the evidence — were briefed and argued before a panel of the Court of Appeals. The oral argument was heard in Bridgeport, Connecticut between 10:15 and 11:00 A.M. on December 30, 1980. The panel did not seem familiar with the issues or record. By the middle of that very afternoon, the decision of the panel had been rendered and the opinion placed in the mail. The opinion — which was full of glaring errors about the record* — affirmed the conviction on a legal theory totally at variance with that submitted to the jury by the trial court: the Court of Appeals held that the burden of proof was *on the defendant* to establish that the payments were loans, and that the defendant had "failed . . . to *prove*, rather than merely assert, that the payments were loans" (emphasis added). The Court of Appeals — in its hastily composed opinion — thus shifted the burden of proof to the defendant on an essential element of the crime after the trial court had plainly placed that burden on the government, and

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*For example, the opinion cites evidence "of similar arrangements with other attorneys" as proof from which "the jury could infer willfulness." But the trial court admitted evidence of similar arrangements *solely* to establish the narrow and uncontested facts that "there is such a practice" and that "Mr. Gargano was aware of this practice." The trial court expressly warned the jury to "draw no inferences beyond those two conclusions" (T. 144). The panel also cited "the evidence [of] failure to keep any records of the alleged loans." But as appellant's counsel emphasized *without contradiction* on oral argument, there was absolutely no evidence in the record of any failure by Gargano to keep records. The panel also pointed to "the suspicious methods employed," but Gargano received loans by way of checks, not cash. He openly consulted with his accountant throughout the three years in question about the loans and with Mr. Lassoff, the lender. There is nothing incriminating or even suspicious about the absence of interest or of a written loan agreement, as these factors merely show that the loans were informal. (*See* Appellant's Brief before the panel at pp. 23-34.)

after the defendant had relied on the trial court's ruling in waiving his right to testify on his own behalf.

The Court of Appeals thus denied defendant due process in several important ways: the court, itself, violated his rights by affirming the conviction on a legal theory different from that presented to the jury; the court, itself, denied him the right to appellate review by the hasty and slipshod manner in which it considered and decided the serious issues raised on appeal; and the court erred on the merits in affirming the conviction in the face of the serious issues raised in the briefs and oral argument. Accordingly, petitioner seeks either a reversal of his conviction or a remand to a different panel of the Court of Appeals for full consideration of the serious issues raised below, and with directions to review the sufficiency of the evidence on the basis of the theory submitted to the jury — namely, that the burden of proof is on the government as to all elements of the crimes.

II. Facts.

On June 26, 1980, after a four day jury trial before the Honorable George S. Pratt, United States District Judge for the Eastern District of New York, defendant John Gargano was convicted of three counts of tax evasion and three counts of filing false income tax returns, for the tax years 1973, 1974, and 1975. On September 16, 1980, defendant was sentenced to three years imprisonment followed by three years probation and $30,000 in fines. On September 23, 1980, defendant filed his notice of appeal. On December 30, 1980, a panel of the Court of Appeals affirmed the conviction on a legal and factual theory completely at variance with the one presented at trial. On March 10, 1981, the Court of Appeals denied rehearing and rehearing en banc.

There was no dispute that Gargano, a federal compensation representative representing federal employees as well as longshoremen and harbor workers before the Federal Workmen's Compensation Board in New York, received approximately 144 checks totalling $520,000 from attorney Martin Lassoff during the three years in question. The government's theory was that Gargano should have declared these checks as income because he knew that they represented "referral" or "forwarding" fees for cases referred to Lassoff by Gargano. Defendant's contention was that the checks were loans from Lassoff, given in consideration for Gargano recommending Lassoff as an attorney to Gargano's clients. Loans are not, of course, taxable income.

There were only three people involved in the transactions: Gargano, Lassoff, and Gargano's accountant, Julian Fischgrund, who was consulted on the taxability of loans. The record at trial includes sworn statements by both Lassoff* and Fischgrund** that the sums were loans. The government

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* As a result of compounded errors by the trial court, Lassoff did not testify directly as a witness at Gargano's trial. However, much of his sworn testimony during an IRS question-and-answer session was read into evidence during the cross-examination of IRS Agent Rundlatt. (T. 265-81.) It is undisputed that Lassoff stated:

> They were loans as Mr. Gargano felt the need for money to build up his business or for whatever purpose he needed the money for. (T. 273.)
>
> • • •
>
> I didn't take [the checks to Gargano] off my income [tax return as a deduction] as I told you, it is all my money. (T. 274-75.)

** Fischgrund testified that in the middle of 1972, he advised Gargano that to incur a loan does not generate income. (T. 349.) He repeated this advice at a meeting with Gargano and Lassoff at the end of the summer in 1972, warning Lassoff not to improperly deduct money that would constitute loans to Gargano. (T. 349-50.) Fischgrund was aware of the loans prior to the preparation of Gargano's returns by Fischgrund's office in 1973, 1974, and 1975; the loan sums were not included on the returns because the money

failed to present any evidence on the nature of the transactions or on the parties' intent.

Appellant's position is that he received interest-free loans from Lassoff because he recommended Lassoff as a lawyer to Gargano's clients. Interest-free loans, or low interest loans, are a common and entirely legitimate form of compensation, which have the added benefit of being tax-free. (T. 266-67.)* Gargano presented compensation claims before federal labor board commissioners. Often Gargano's clients would need an attorney to handle the cases if they moved on to trial before an administrative law judge or to file third-party admiralty lawsuits against a ship. In 1972, a federal statutory change increased the federal labor board's jurisdiction over longshoremen and harbor worker compensation matters, expanding the number of cases handled by federal compensation representatives. However, from 1972 until 1977, when a Supreme Court decision settled certain jurisdiction technicalities, many of the compensation cases were in limbo — on appeal or delayed in processing. As a result, the settlement awards to claimants and the judicially-awarded fees to representatives were also delayed. (*See* T. 155-57, 448-55.) Gargano needed the loans to assist his cash position, to keep his business and household running, until these earlier fees were processed and collected. (T. 273.) Gargano, a cash-basis taxpayer, planned that when he later received this fee income, he then would have sufficient funds to repay Lassoff as well as to pay taxes on the income received from the awards. (*See* T. 249, 275-76, 281.) Accordingly, he planned his financial situation so as to increase the receipt of spendible money (in

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did not constitute income. (T. 351, 352.) Fischgrund's firm signed the bottom of each return. (T. 351.) Fischgrund was told of the loans by both Lassoff and Gargano. (T. 354.)

* The trial transcript is cited herein as T.

the form of loans) at a time when his income was low, and to postpone payment of income taxes (as well as repayment of his loans) until his income was high. This should not be surprising, since interest-free loans are recommended as "an attractive tax-planning opportunity" precisely because they do not incur gift or income tax liability. Mitchell, "Interest-Free Loans: Opportunities for Tax Planning," 65 A.B.A.J. 634 (Apr. 1979); *see* Comment, 24 Loyola L.Rev.33, 45 (1978) (citing example of "a frequent and valuable customer" or similar individual who is experiencing a temporary shortage of cash being given an interest-free loan by a business in the form of additional time to pay on his account).

There were but two major points of dispute between the government and the defendant in this case:

> 1) whether the checks paid to the defendant by Lassoff over a three-year period constituted loans (as contended by the defendant) or fees (as contended by the government); and
>
> 2) if these checks constituted fees, whether the defendant honestly believed they were loans (as contended by the defendant) or whether defendant knowingly and intentionally evaded taxes and signed a false return (as contended by the government).

The government's main witness was a lawyer named Mazeau who was given immunity in exchange for his testimony. He testified that he had heard that during 1973 Lassoff had paid referral fees amounting to 15 percent of the fees earned in the cases referred to him by the defendant. Mazeau had no idea of the total dollar amount of the alleged 1973 fees, nor did he know anything about subsequent years. Other than Mazeau's testimony, the government offered no

evidence that the checks were fees rather than loans or that the defendant had willfully intended to evade taxes. It told the jury that the "lack of evidence" was "the best evidence." (T. 572.) It invited the jury to "infer" from the checks themselves that they were referral fees: "Now looking at these checks . . . in and of themselves if they could talk they would say we are not loans, we are income. . . ." (T. 516, 64.) And it argued that the jury should infer the defendant's willfullness from the fact that he offered the defense that the checks were loans. The court repeatedly noted that the government's case was extremely weak. (*See, e.g.*, T. 212, 216, 222, 229, 263.)

The main witness for the defense was going to be attorney Lassoff, who was prepared to testify — as he had already done under oath at an IRS question-and-answer session — that the checks were loans, and that he had not deducted them as expenses from his own income taxes. Just before Lassoff was to be called to the witness stand, the trial court made the following uncalled for and injudicious statement: "I don't know why you didn't indict the two of them [Gargano and Lassoff] and try them jointly, and just tell the jury to take their choice." (T. 427.) Lassoff's lawyer who heard the statement immediately advised Lassoff to invoke his privilege against self-incrimination. When the trial judge was advised of this by defense counsel and invited to inquire about "the basis for his advice" the judge made the following incredible statement:

> For my purposes it [Lassoff's lawyer's advice to Lassoff to invoke the privilege] does not have to be *any basis*. He could make a *frivolous capricious* advices for all it matters to me.

(T. 430; emphasis added.)

Lassoff was then called to the witness stand and asked whether he intended to invoke his privilege. Upon answering

"yes," he was excused without him or his lawyer being asked a single question to determine the validity or scope of his claimed privilege. (T. 438.) To compound this obvious error, the trial court instructed the jury that "Defendant has the power to subpoena anyone in support of his position if he chooses" and that "either party has the right to subpoena books and records" (referring to Lassoff and his documents). (T. 588, 647.)

This case was submitted to the jury on the legal theory that the government had the burden of proving beyond a reasonable doubt — and without the aid of any *burden-shifting presumption* — that the checks at issue represented income and not loans. At the very beginning of the trial, the government's theory was expressly set out in the following exchange:

> THE COURT: . . . if the government were to prove the receipt of the moneys, that is not enough to get to jury — proving nothing more than the Lassoff moneys?
>
> MR. FIRETOG [the prosecutor]: Right.
>
> THE COURT: It is enough for the IRS to say the burden is on you, *but it does not work that way in a criminal case.*
>
> MR. FIRETOG: As I read over some of the criminal cases, the periodic receiving of income over a substantial period of time of large amounts, would be prima facie evidence of income.
>
> *However, that is not what the government is resting on.*
>
> I have a witness that will testify that Gargano told him that he receives 15 percent . . . I will also be able to show that Lassoff received cases from Gargano. So I have a chain . . .

(T. 18-19; emphasis added.)

> THE COURT: I am trying to get myself oriented . . . IRS does place on you a burden of justifying the non-taxability of any moneys that you received. I guess that means that they can collect it from you civilly, *but if you keep your mouth shut they cannot get you criminally, if there is no other evidence.*

(T. 20; emphasis added.)

The trial court thus clearly informed the defendant that in a criminal tax case of this kind — as distinguished from a civil tax case — *the burden does not shift to the defendant* to prove that the checks were loans; the burden remains on the Government to prove beyond a reasonable doubt that the checks constituted income.* Indeed, the trial court stated that if a criminal defendant keeps his "mouth shut, they cannot get you criminally, if there is no other evidence" in addition to the unexplained checks.

At no point during the course of the trial did the trial court inform the defendant — or even suggest *to him* — that the burden had shifted to him, and that it was now incumbent upon *him to prove* that the payments were loans. Indeed, the trial court reiterated the government's continuing burden of proving that the checks were income rather than loans. (*See*

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* THE COURT: I was only asking him [the prosecutor] about the difference between civil and criminal proceedings. IRS says any money you get is income, if you cannot prove it to the contrary, which I felt was a little reversing the American system of doing things.

It does not seem to gag the Supreme Court. I have to follow them. Apparently that is only in civil proceedings.

MR. MUSSOFF: That is correct.

THE COURT: *They can take your property, but they cannot take your liberty on that kind of a presumption.*

(T. 218; emphasis added.)

T. 218, 222, 492-93.) Relying on the government's continuing burden of proof — and on his own lack of any burden — the defendant in this case waived his right to testify on his own behalf and, to use the trial court's terminology, kept his "mouth shut."*

It was thus clearly established as the law of the case that the government had the burden of proving that the checks were income rather than loans, that this burden never shifted to the defendant, and that there was absolutely no burden on the defendant to prove that the checks were loans. Legal principles set forth by the trial court become, in the absence of objection, law of the case. *See, e.g., L.B. Foster Co.* v. *Hurnblad*, 418 F.2d 727, 729 (9th Cir. 1969).

These legal principles, upon which the defendant *relied*, were turned completely on their head by the opinion of the Court of Appeals. The panel's opinion affirmed the defendant's conviction on the basis of its conclusion that *he failed to prove* that the checks were loans:

> the government established a case under the standards set forth in *Slutsky, supra*[**]: "'*Once the government proves unreported receipts having the appearance of in-*

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*The prosecutor in his summation acknowledged the government's burden to "have proven beyond a reasonable doubt that [the checks] are not loans but income" (T. 504). The jury was charged that:

> the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

(T. 603.)

> It is for you [the jury] to decide ultimately whether *the Government* has established beyond a reasonable doubt that these payments were income to the defendant and *not loans*.

(T. 608; emphasis added.)

** *United States* v. *Slutsky*, 487 F.2d 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974).

> *come . . . the burden is on the defendant to explain the receipts, if not reportable income.*' . . ." 487 F.2d at 842, quoting *United States* v. *Lacob*, 416 F.2d 756, 760 (7 Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970) (emphasis in the *Slutsky* opinion). Receipt of the payments having been conceded, the government introduced ample circumstantial evidence from which the jury was entitled to infer that the money was income. *Appellant failed thereafter to prove*, rather than merely assert, that the payments were loans. . . .

(Statement, p. 2; emphasis added; attached hereto as Appendix A.)

There are two fundamental errors in the panel's decision: first, the panel is simply wrong as a matter of law that the burden-shifting "standards set forth in *Slutsky*" are applicable to a case of this kind; and second, even if the panel were correct about the law, it is the most fundamental violation of due process for an appellate court to affirm a criminal conviction on the basis of a different theory from the theory on which the case was tried. *See, e.g., Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). It is an especially grievous violation of due process for a criminal defendant to be informed — for the first time on appeal — that he had failed to satisfy his burden of proof on a crucial element of the crime *after* the trial court had expressly and repeatedly told him that he had no such burden, and after he waived his right to testify on his own behalf in express reliance on that ruling.

Thus, the upshot of these combined errors was that the defendant was denied the right to call his most crucial exculpatory witness, and the jury was led to believe that the absence of this witness was attributable to the defense. The jury convicted the defendant on the basis of meager — and wholly in-

sufficient — government evidence of guilt, without hearing the only witness who could directly shed light on the transactions at issue and thereby establish the defendant's innocence. To compound these errors even further, the Court of Appeals affirmed the conviction on a legal and factual theory completely at variance with that presented to the jury. Defendant has never had his day in an appellate court on the insufficiency of the government's evidence to satisfy its burden of proof. The search for truth has been thwarted, with the consequence that an innocent defendant has been convicted and sent to prison.

Reasons for Granting the Writ.

I. The Court should Grant the Writ to Determine whether Defendant was Denied due Process by the Court of Appeals' Affirmance of his Conviction on a Legal and Factual Theory Completely at Variance with the Theory Presented to the Jury.

A. *An Appellate Court Cannot Change Theories Underlying Convictions "Midstream".*

This Court has recently emphasized that "we [and presumably other appellate courts] cannot affirm a criminal conviction on the basis of a theory not presented to the jury . . .." *Chiarella* v. *United States*, 100 S.Ct. 1108, 1119 (1980). While *Chiarella* and the other cases cited, *infra*, involve an appellate court changing the evidence on which a conviction was based, or changing the crime *charged* — and, *Gargano* involves a change in the burden of proof — the underlying principle still applies directly to *Gargano*. A case cannot go to the jury in one framework and be affirmed on a totally different one.

In *Chiarella*, the Court held that a printer's employee, who profited from knowledge he gleaned from a prospectus being

printed, had no duty to a company's shareholders and did not violate Rule 10(b) standards. The Court then refused to decide whether the printer's employee had breached a duty to the acquiring *corporation* because that theory was not submitted to the jury.

Likewise, in *Dunn* v. *United States*, 442 U.S. 100, 106, 107 (1979), in reversing defendant's perjury convictions the Court stated:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. . . . The jury might well have reached the same verdict [and conclusion of perjury] had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. But the offense was not so defined, *and appellate courts are not free to revise the basis on which a defendant is convicted* simply because the same result would likely obtain on retrial. . . . "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.". . . [Citations omitted; emphasis added.]

In *Dunn*, the Supreme Court overturned the Court of Appeals' affirmance which had been based on defendant's October 21st statement, because the perjury indictment and jury charge only mentioned a September 30th statement.

The Supreme Court in *Eaton* v. *City of Tulsa*, 415 U.S. 697, 698 (1974), reiterated the same principle. The State appellate

court had affirmed a criminal contempt conviction based on general statements of disrespect in the record by the petitioner, whereas the trial court had found contempt based only on one specific expletive. The Supreme Court reversed the conviction: the single expletive constitutionally could not support the contempt conviction, and the appellate court denied petitioner's due process rights in sustaining the trial court by treating the conviction as based on general statements — *i.e.*, based on a charge not made.*

It is especially unconscionable — and unconstitutional — for a court of appeals to impose a burden of proof upon a criminal defendant retroactively *after* the defendant, in express reliance on the trial court's contrary ruling, waived his right to take the witness stand on his own behalf.

B. *Shifting the Burden of Proof of an Essential Element of a Crime to a Criminal Defendant Itself Violates Due Process.*

Regardless of whether it is a trial court or an appellate court which shifts the burden of proof to the criminal defendant, the

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* *See also Rewis* v. *United States*, 401 U.S. 808, 814 (1971) (reversing "Travel Act" convictions: the government's theory on appeal was not the theory under which the jury was instructed — the government's proposed new interpretation of the Travel Act could not be used to uphold the conviction); *Garner* v. *Louisiana*, 368 U.S. 157, 163-64 (1961) (the Court would not "be concerned" whether the evidence proved commission of another crime, for it would be a due process violation to convict on a charge never made); *Cole* v. *Arkansas*, 333 U.S. 196, 201-02 (1948) (reversing the State Supreme Court's affirmance of defendant's conviction based on *Section 1* of a State Labor statute, when the defendants were tried and convicted only on a *Section 2* statutory violation: "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court"); *United States* v. *Porter*, 591 F.2d 1048, 1055-1056 n.6 (5th Cir. 1979) (when the case was not tried or instructed on a "pecuniary loss" theory, the government on appeal could not embrace this theory; the appellate court could not "at this late date reconstruct the government's case to affirm three convictions on a theory which was never adopted at trial"); *United States* v. *Diogo*, 320 F.2d 899, 909 (2d Cir. 1963).

shift under these circumstances violates due process. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), is the latest in a line of Supreme Court cases that have held it violates due process to require a criminal *defendant* to *disprove* an essential ingredient of the crime charged. This principle is directly applicable to *Gargano*: either through the panel's improper reliance on *Slutsky* or through general vagueness in jury instructions, Gargano's due process rights were violated if he was required to prove the payments were loans and not income, rather than the prosecution proving the payments were income and not loans.

In *Sandstrom*, defendant's conviction was reversed because the jury instruction that it was presumed "a person intends the ordinary consequences of his voluntary acts" violated the Fourteenth Amendment requirement that the State prove every element of a criminal offense beyond a reasonable doubt. The substantive issue was whether defendant had committed a "deliberate" crime or a lesser crime. The Montana Supreme Court upheld the above instruction stating that it was acceptable to shift "some" burden of proof on this issue to defendant. The United States Supreme Court disagreed: whether a presumption is "conclusive" or not, it is unconstitutional by the means of a presumption to require a defendant to disprove an element of the crime.

Similarly, in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), the Supreme Court reversed defendant's murder conviction which had been aided by a Maine homicide law that affirmatively shifted the burden of proof to defendant. The Maine law required a *defendant* to prove he acted in "the heat of passion" in order to avoid first degree murder, rather than having the state affirmatively prove defendant acted with "malice aforethought." The Supreme Court held that this shift to defendant and presumption in favor of the prosecution did not comport with due process, citing the first case on this principle, *In re Winship*, 397 U.S. 358 (1970). The Court stated that even

though intent (here, "heat of passion"; in *Gargano*, the intent to make a loan) is typically considered a fact peculiarly within defendant's knowledge, this does not justify shifting the burden to defendant. Nor is it unduly onerous on the prosecution to prove a negative: Maine itself requires the prosecution to prove the absence of "self-defense" beyond a reasonable doubt. *Id.* at 701-02. Sometimes a presumption — such as the presumption of sanity — shifts the burden of *production* to defendant, but the burden of *persuasion* cannot be placed on defendant without more exacting due process standards being met. *See also Patterson* v. *New York*, 432 U.S. 197 (1977).

Accordingly, this Court should grant the writ to determine whether the Court of Appeals' decision, changing theories and imposing the burden of proof on defendant, requires reversal of his conviction.

II. The Court should Grant the Writ to Determine whether the Trial Court's Actions in Relation to the Defendant's Crucial Exculpatory Witness Deprived Him of the Right to a Fair Trial.

A. *The Trial Court Erred in Failing to Probe Lassoff's Assertion of the Fifth Amendment Privilege against Self-Incrimination.*

Up until the eleventh hour during the trial, Martin Lassoff had been waiting to be called as a witness by either the government or the defense: both sides had subpoenaed him (T. 437). Upon learning of Judge Pratt's injudicious comment on the record — that the government should have indicted both Gargano and Lassoff — Lassoff then chose to heed his lawyer's advice to assert a blanket Fifth Amendment privilege against self-incrimination.

Judge Pratt refused to hear the basis for Lassoff's attorney's advice or the assertion of the privilege, stating "for my pur-

poses it does not have to be any basis," and it could be for "frivolous" and "capricious" reasons (T. 430). The court did not attempt to ascertain either the validity of Lassoff's claim of privilege or its scope — *i.e.*, whether certain questions could be put to Lassoff that would not trigger an incriminating response or that had been waived by his prior sworn statement. When Lassoff was called to the stand by defendant, the judge allowed Lassoff to make a blanket assertion of the privilege, not requiring specific questions to be asked and the privilege claimed with respect to each. Judge Pratt's failure to determine the proper basis and scope of the privilege, and to have the claim asserted in response to specific questions, requires reversal of Gargano's convictions.

It is established beyond dispute that the trial court has a strong *duty* to determine the legitimacy of a witness' reliance upon the Fifth Amendment. *E.g.*, *Roberts* v. *United States*, 100 S.Ct. 1358, 1364 (1980); *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); *Rogers* v. *United States*, 340 U.S. 367, 374-75 (1951); *United States* v. *Goodwin*, 625 F.2d 693, 700-01 (5th Cir. 1980); *United States* v. *Reese*, 561 F.2d 894, 900 (D.C. Cir. 1977); *Klein* v. *Smith*, 559 F.2d 189, 200 (2d Cir.), *cert. denied*, 434 U.S. 987 (1977); *Warnell* v. *United States*, 291 F.2d 687, 688 (5th Cir. 1961).* Specifically, a witness' blanket assertion of the privilege — that he will assert the Fifth Amendment to any question counsel might ask — is totally unacceptable: trial judges have been reversed where they have excused witnesses without inquiring into the validity and scope of the witnesses' claims of privilege. *United States* v. *Goodwin*, *supra*, 625 F.2d at 701; *United States* v. *Melchor-*

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* This is especially true when the witness has been called by the defendant in the exercise of his Sixth Amendment right and where the witness is a crucial one with important testimony to give. *See United States* v. *Melchor-Moreno*, 536 F.2d 1042, 1045-46 (5th Cir. 1976).

Moreno, 536 F.2d 1042, 1049 (5th Cir. 1976); *United States* v. *Gomez-Rojas*, 507 F.2d 1213 (5th Cir.), *cert. denied*, 423 U.S. 826 (1975). *See, e.g., United States* v. *Anglada*, 524 F.2d 296, 300 (2d Cir. 1975). "A court must make a particularized inquiry, deciding, *in connection with each specific area* that the questioning party wishes to explore, whether or not the privilege is well-founded." *United States* v. *Melchor-Moreno*, *supra*, 536 F.2d at 1049 (emphasis added); *see United States* v. *Partin*, 552 F.2d 621, 631-32 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977) ("As to *each question*, the test is whether the witness is confronted with substantial and 'real,' and not trifling or imaginary hazards of incrimination") (emphasis added).

In the recent case of *United States* v. *Goodwin*, 625 F.2d 693 (5th Cir. 1980), the court reversed defendants' convictions because the trial judge without inquiry allowed two witnesses to make blanket assertions of the Fifth Amendment privilege. Defendants were charged with a conspiracy to smuggle marijuana into a prison. Defendants wished to call as witnesses two prison inmates whose testimony could have helped defendants establish their defense of entrapment. Upon the representation of the witnesses' appointed attorneys that their clients had "*valid*" Fifth Amendment claims as to "unspecified criminal activities" and as to "matters directly or indirectly involved in this case," the court upheld the assertions of the Fifth Amendment. No hearing was conducted on the validity and scope of the self-incrimination claims. The Fifth Circuit reversed the trial court's handling of the bald assertions of privilege:

> The witness may be totally excused only if the Court finds that he would "legitimately refuse to answer essentially all relevant questions." *United States* v. *Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975). . . Even where the

> judge is satisfied as to the validity of the Fifth Amendment claim, he must give heed to the proper scope of such a claim. A finding of such a valid claim does not normally foreclose all further questions. [*Id.* at 701.]

In Gargano's case, not only did the judge fail to explore the *scope* of the claim, he did not even explore its *validity*. Indeed, he expressly held that the validity of the claim was irrelevant "for [his] purposes." This case is thus in direct conflict with the decisional law of the Fifth Circuit.

Likewise, in *United States* v. *Melchor-Moreno*, 536 F.2d 1042 (5th Cir. 1976); *United States* v. *Gomez-Rojas*, 507 F.2d 1213 (5th Cir.), *cert. denied*, 423 U.S. 826 (1975); and *United States* v. *Waddell*, 507 F.2d 1226 (5th Cir. 1975), convictions were reversed because trial judges failed fully to probe Fifth Amendment claims of witnesses subpoenaed by defendants. The witnesses in each case were government informers whose testimony was key to defendants' theories of entrapment. The exclusion of the informers' testimony in its entirety rose to constitutional error, violating defendants' Sixth Amendment rights to have compulsory process for obtaining witnesses, to offer the witnesses' testimony — in plain terms, to present a defense. *Washington* v. *Texas*, 388 U.S. 14, 19 (1967). Also implicated was the broad requirement of fundamental fairness guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments: "few rights are more important than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973); *United States* v. *Melchor-Moreno*, *supra*, 536 F.2d at 1045-46.

The need for a thorough scrutiny by the judge is far greater when the witness is called by the defense than when the witness is called by the government. In the first place the defendant has a constitutional right to the witness' testimony, whereas the government's "rights" are not constitutional in

magnitude. Moreover, the government has other ways to probe the "bona fides" of a witness: it often calls witnesses before a grand jury or — as in this case — before an IRS revenue agent. It may invoke the contempt power to compel obedience. Defendants do not have these options and are thus far more dependent upon the judge's probing of the witness' claim of privilege at the trial in order to obtain testimony.

Judge Pratt's handling of Lassoff's assertion of the Fifth Amendment stands in marked contrast to the above authority. Judge Pratt did not take a hard look at the blanket assertion of the privilege or at possible limited questioning, did not interrogate Lassoff himself, and did not hear — much less seriously consider — Lassoff's attorney's reasoning. Judge Pratt did not conduct a hearing, did not employ any alternative method of ascertaining the validity of the privilege, and did not know peculiar information about Lassoff reinforcing a conclusion of potential self-incrimination. Indeed, Judge Pratt indicated that he knew nothing about Lassoff or his situation. In short, Judge Pratt did not perform the affirmative duty of evaluation required of a trial judge faced with a crucial witness' blanket Fifth Amendment claim. Standing alone, this is a deprivation of Gargano's constitutional rights and requires reversal of his conviction.

B. *Lassoff's Testimony should Not have been Excluded in its Entirety.*

A more compelling case for a judge's active probing of a Fifth Amendment claim is hard to imagine. Had Judge Pratt even begun to measure Lassoff's claim against well-accepted standards, he quickly would have found that a significant portion, if not all, of Lassoff's testimony should have been compelled. Many of the areas on which Lassoff alone could testify simply would not fall under the umbrella of the Fifth Amendment.

The protection of the privilege is confined to instances where the witness has reasonable cause to apprehend danger from a direct answer — reasonable cause to believe a direct answer would support a conviction or furnish a link in the chain of evidence needed to prove a crime. *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951). The self-incrimination privilege "protects against real dangers, not remote and speculative possibilities." *Zicarelli* v. *New Jersey State Commission of Investigation*, 406 U.S. 472, 478-79 (1972). Thus, the test is whether, under all the circumstances of the case, in connection with each area of questioning, the claimant is "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); *United States* v. *Neff*, 615 F.2d 1235, 1239 (9th Cir. 1980); *United States* v. *Partin*, 552 F.2d 621, 631-32 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977).

Lassoff's testimony about his financial relationship with Gargano, and the loans made, would probably not present a substantial or real hazard of either supporting a conviction or providing a link in a chain of evidence needed to prove a crime. Repeating his sworn testimony that he did not deduct these checks would not be incriminating. Even if Lassoff were able to make a valid claim of the Fifth Amendment to some inquiries, the other areas of questioning and Lassoff's answers thereto would still be allowable, indeed crucial to Gargano's defense. *See United States* v. *Anglada*, 524 F.2d 296, 300 (2d Cir. 1975) (the trial court should consider the possibility of allowing carefully phrased, limited questions).

Moreover, under all circumstances, Lassoff should certainly have been compelled to testify as to the loans and his relationship with Gargano during 1973 — the only year about which the government even claimed to have any incriminating evidence. Judge Pratt easily could have ascertained this fact if he had performed his duty to probe the claim of privilege.

There was no danger at the time of Gargano's trial — June 23, 1980 — of Lassoff being prosecuted for tax evasion, or for false filing, as to his 1973 tax returns. The six-year statute of limitations for these crimes* would have expired in April, 1980, as Lassoff filed his 1973 tax returns before April 15, 1974. It seems clear that Lassoff's claim of privilege should not have been allowed as to testimony about 1973, a period now time-barred from tax prosecution. *See Klein* v. *Smith*, 559 F.2d 189 (2d Cir.), *cert. denied*, 434 U.S. 987 (1977); *In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618, 622-623 (N.D. Ill. 1979).

The crucial importance of Lassoff's testimony to Gargano's defense — and indeed to this case as a whole — has previously been discussed. However, it should be emphasized that testimony by Lassoff, even limited to 1973 and prior years, would have been of critical exculpatory value to defendant. It would have rebutted Mazeau's second-hand testimony on Gargano-Lassoff arrangements in 1973; indeed, it would have established the facts as to *the one year* on which the government has presented any evidence whatsoever.

Upon inquiry, Judge Pratt also could have found that Lassoff waived his privilege against self-incrimination, at least as to some areas of questioning. Lassoff testified in depth under oath during the IRS question-and-answer period on the loans to Gargano, on Lassoff's deductions, and on Lassoff's intent in providing the funds to Gargano. He did not invoke the Fifth Amendment privilege at that time. Repeating this testimony, or supplying details on these subjects, would not have exposed Lassoff to *further* incrimination. *Rogers* v.

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* 26 U.S.C. § 6531 subsections (2), (3), and (5) provide for six-year limitation periods for tax evasion, aiding in the preparation of false returns, or filing false returns. No complaint was ever filed against Lassoff. Indeed, the record only shows that Lassoff was civilly audited (T. 205, 400-03, 416).

United States, 340 U.S. 367, 373 (1951); *In re Master Key Litigation*, 507 F.2d 292, 293-94 (9th Cir. 1974). In a criminal prosecution such as Gargano's, where the interest in finding the truth is greatest, a court "may be more willing [than usual] to find a waiver by a witness whose testimony is important in determining an accused's guilt or innocence. Where a defendant's right to confrontation [of witnesses] is implicated, the court may be particularly disposed to find a waiver." Note, "Testimonial Waiver of the Privilege Against Self-Incrimination," 92 Harv. L. Rev. 1752, 1762 (1979).

C. *To the Extent that Lassoff's Claim of Privilege may have been Valid, Limited Use Immunity should have been Granted to Lassoff for Specific Answers.*

The privilege against self-incrimination is a frequent obstruction to the presentation of a criminal defendant's case: it involves a direct confrontation between the defendant's Sixth Amendment rights and the witness' Fifth Amendment rights. *See* Westen, "The Compulsory Process Clause," 73 Mich. L. Rev. 71, 166-68 (1974); Note, "The Fifth Amendment Testimonial Privilege as an Impediment to the Defense When Invoked by a Potential Exculpatory Witness," 42 Albany L. Rev. 482 (1978). However, as Westen points out, the clash can be avoided: the Fifth Amendment privilege is not a privilege to remain *silent* but a privilege against prosecutorial use of the compelled testimony. Use immunity accorded to the witness protects all constitutional rights involved, and arguably such immunity should be required for defense witnesses with critical exculpatory testimony. 73 Mich. L. Rev. at 167-68; *see, e.g.*, Note, "The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses", 91 Harv. L. Rev. 1266 (1978).

Lassoff's exculpatory testimony was so important for defendant Gargano's defense that, even had Judge Pratt evaluated and found the claim of privilege to be valid, Lassoff should have been allowed to testify through a grant of use immunity. At the beginning of Gargano's trial, Lassoff had been informed that an order for use immunity had been prepared. Even after the government decided not to grant Lassoff use immunity, Lassoff was still prepared to testify up until near the end of trial. Lassoff's change of heart occurred after the judge queried "why didn't you [the government] indict them both [Gargano and Lassoff]?" It was patently unfair to Lassoff to have been manipulated by the prosecutor on the immunity issue and then forced to take the Fifth Amendment by the judge's improper comments. It was even more unjust to defendant Gargano to be stripped of his only source of material, exculpatory testimony.

Furthermore, Gargano was denied a fair trial because the government granted immunity to its main witness — Robert Mazeau — and not to defense witness Lassoff. The government's selective use of its immunity power has distorted the truth and provides an additional reason to compel use immunity for Lassoff. *See United States* v. *Davis*, 623 F.2d 188, 193 (1st Cir. 1980); *United States* v. *Alessio*, 528 F.2d 1079, 1081-82 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); *Earl* v. *United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966).

Finally, no public interests would be subverted by granting use immunity to Lassoff. *See United States* v. *Turkish*, 623 F.2d 769, 775 (2d Cir. 1980). Testimony by Lassoff as to the loans would have little bearing, if any, on a government prosecution of Lassoff that was based on Lassoff's alleged failure to declare income. There are no individuals to whom Lassoff would be giving "an immunity bath" by testifying. The government had already investigated Lassoff and knew what he would say on the witness stand; with Lassoff's sworn statement

before the IRS, "cooperative perjury" was not a threat to the government at the time of trial. In fact, if the government feared that Lassoff's prior testimony was false, granting use immunity would only protect the government further by the fact that Lassoff again could be subjecting himself to perjury charges.

D. *Defendant was Deprived of a Fair Trial by the Trial Court's Instructions to the Jury Concerning Defendant's Ability to Call Witnesses.*

The trial court, in this case, conveyed to the jury the clear impression that both the government *and the defendant* had equal access to the testimony and books of Mr. Lassoff. In its charge, the court stated that:

> The defendant has the *power* to subpoena anyone in support of his position *if he chooses*, however, and *he may exercise that power if he chooses*. [T. 588; emphasis added.]

Later, in response to the jury's question during deliberations as to why Lassoff's books weren't subpoenaed, the court answered:

> In a lawsuit, *either party* has the right to subpoena witnesses or records. . . . [T. 647; emphasis added.]

While the defendant does have the ability to *subpoena* whatever witnesses or evidence that he requires to present his defense, in this case the defendant did not have the ability to have Mr. Lassoff *actually testify*. (Jurors do not, of course,

understand the subtle distinction between *subpoenaing* a witness and *actually obtaining his testimony*.)

After Mr. Lassoff invoked his Fifth Amendment privilege not to testify, only the government had the ability — by granting him immunity — to present his testimony.

Given the fact that the jury was obviously prepared to draw inferences from Mr. Lassoff's absence,* the judge's instructions that either side had the ability to call whatever witness materially deprived the defendant of a fair trial. Lassoff's testimony *was not equally* available to both sides. Only the government could elicit his testimony, because only the government had the power to grant Lassoff the immunity necessary to negate the exclusionary effect of his invoking his Fifth Amendment privilege. Therefore, regardless of what inferences the jury might properly have been instructed that they could draw *if Mr. Lassoff were in fact available* to the defendant, the court erred by giving instructions which implied that it was within the defendant's power to produce Lassoff.** The trial court's instruction was particularly inappropriate and prejudicial in a case where, as here, a major portion of the responsibility for Lassoff's refusal to testify was directly attributable to the trial court's improper statement about Lassoff's being indicted. Accordingly, the defendant's convictions should be reversed.

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*Not only were they urged to do so by the prosecutor during his summation (see T. 567-68, 572-73, 575, 576), but they also inquired as to the absence of Lassoff's tax records *during their deliberations* (T. 633).

**Defendant objected to these instructions; indeed, defendant specifically took exception to the trial court's mention of defendant's ability to subpoena Lassoff's records and to the court's failure to instruct that defendant has no duty to call any witness on his behalf (T. 495, 627, 642, 643, 645, 648-49).

Conclusion.

For the foregoing reasons, petitioner respectfully requests that the petition be granted and the convictions be reversed, or — in the alternative — that the case be remanded to a different panel of the Court of Appeals for a full consideration of the issues raised, including a review of the sufficiency of the evidence on the basis of the theory submitted to the jury — namely, that the burden of proof remains *on the government* to establish beyond a reasonable doubt that the payments were taxable income rather than loans, and that the defendant intended to defraud the Internal Revenue Service.

Respectfully submitted,

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(617) 661-1965
Counsel for Petitioner

Appendix A.

United States Court of Appeals

FOR THE
SECOND CIRCUIT*

Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at United States Courthouse at Bridgeport, Connecticut, on the 30th day of December, one thousand nine hundred and eighty.

HON. LEONARD P. MOORE,
HON. WILLIAM H. TIMBERS,
Circuit Judges.
HON. LLOYD F. MacMAHON,
District Judge,
sitting by designation.

Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,
v. No. 80-1372
JOHN GARGANO,
Appellant.

Appeal from the United States District Court for the Eastern District of New York.

[* This opinion constitutes a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.]

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed*.

Appellant was charged with three counts of tax evasion, 26 U.S.C. § 7201 (1976), and three counts of filing false returns, 26 U.S.C. § 7206(1) (1976). After a jury trial, he was convicted on all counts.

The charges against appellant stemmed from payments of $520,000 received by him from his employer, attorney Martin Lassoff. The transfers of money were undisputed. The issue at the heart of the case was whether the payments were interest-free loans or income payments. In order to convict, the jury necessarily believed beyond a reasonable doubt that the payments were income to appellant and thus were unreported taxable income. Appellant raises two claims of error on appeal, each of which we rule upon as follows.

First, appellant claims that the evidence was insufficient to support the conviction. Viewing the evidence as we must in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), we hold that there was ample evidence to support the conviction. Much of the evidence was circumstantial, but in tax evasion cases this is not uncommon. *See United States* v. *Slutsky*, 487 F.2d 832, 839-40 (2 Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). The government did not present an unpersuasive case, as appellant suggests, which in the end rested on the fact that appellant lacked a better explanation for the payments. Rather, our careful examination of the record as a whole satisfies us that the government established a case under the standards set forth in *Slutsky*, *supra*: "'*Once the government proves unreported receipts having the*

appearance of income . . . the burden is on the defendant to explain the receipts, if not reportable income . . .." 487 F.2d at 842, quoting *United States* v. *Lacob*, 416 F.2d 756, 760 (7 Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970) (emphasis in *Slutsky* opinion). Receipt of the payments having been conceded, the government introduced ample circumstantial evidence from which the jury was entitled to infer that the money was income. Appellant failed thereafter to prove, rather than merely assert, that the payments were loans. Similarly, as to the other elements of the offenses charged, and in particular the element of willfulness, we hold that there was ample evidence, as well as inferences which reasonably could be drawn from the evidence, to support the conviction. In particular, the evidence of similar arrangements with other attorneys, the failure to keep any records of the alleged loans, and the suspicious methods employed all provided an ample basis from which the jury could infer willfulness.

Second, appellant claims that the district court's handling of Lassoff's assertion of his Fifth Amendment privilege against self-incrimination was improper. We disagree. Lassoff might have been an important witness for the appellant, but we are not satisfied that his testimony necessarily would have been crucial. Much of Lassoff's version of the transaction already was before the jury as the result of the IRS agent's testimony. Lassoff had ample reason to be fearful of the prospect of proceedings against him. The trial judge, who was well acquainted with the facts of the case and with Lassoff's silence before the grand jury, was not required to grant a hearing, either in open court or in chambers, to determine the scope and legitimacy of the claim of privilege. Of major significance is the fact that no objection to this procedure was made in the trial court. On that ground alone, absent any satisfactory explanation by appellant as to why we should consider for the first time on appeal claims not asserted below, we would be

justified in rejecting this claim of error. Furthermore, we find singularly unpersuasive appellant's claim that the trial court erred in not granting limited use immunity to the witness Lassoff. Our Court recently discussed in some detail the emerging doctrine of compulsory use immunity to insure a defendant's confrontation rights and found it was not applicable to the facts of that case. *United States* v. *Turkish*, 623 F.2d 769, 774-78 (2 Cir. 1980). We likewise find it inapplicable to the instant case. This surely is not the hypothetical "compelling" case referred to by Judge Newman in *Turkish*, especially in view of the ample parallel and circumstantial evidence and the recitation in court of Lassoff's previous statements.

Appellant was convicted on the basis of overwhelming evidence of serious offenses after a fair trial. We affirm the conviction on all counts and we order that the mandate issue forthwith.

/s/ _____
LEONARD P. MOORE
UNITED STATES CIRCUIT JUDGE

/s/ _____
WILLIAM H. TIMBERS
UNITED STATES CIRCUIT JUDGE

/s/ _____
LLOYD F. MacMAHON
UNITED STATES DISTRICT JUDGE
SITTING BY DESIGNATION

Appendix B.

United States Court of Appeals
Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at United States Court House, in the City of New York, on the 10th day of March, one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 80-1372

JOHN GARGANO,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, John Gargano,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____
A. DANIEL FUSARO,
Clerk

Office-Supreme Court, U.S.
FILED
JUL 15 1981

No. 80-1883

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN GARGANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the court of appeals improperly affirmed petitioner's convictions for attempted income tax evasion and filing false tax returns on the basis of a theory not presented to the jury.

2. Whether petitioner was deprived of a fair trial by the refusal of a witness to testify on the basis of the witness's Fifth Amendment privilege.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1883

JOHN GARGANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. 1a-4a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1980 (Pet. App. 1a-4a). A petition for rehearing was denied on March 10, 1981 (Pet. App. 5a). The petition for a writ of certiorari was filed on May 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of attempted income tax evasion and on three counts of filing false income tax returns for the taxable

years 1973 through 1975, in violation of 26 U.S.C. 7201 and 7206(1). The government alleged that during the prosecution years petitioner failed to report as income the proceeds of some 145 checks, totalling approximately $520,000, which he received from Martin Lassoff, an attorney, thereby understating his income tax liability for the prosecution years by more than $200,000 (Pet. App. 2a; App. 290-292).[1] Although petitioner acknowledged receipt of the checks, he contended that they were the proceeds of interest-free loans made to him by Lassoff and hence were not taxable income (Pet. App. 2a). The jury returned a verdict of guilty on all six counts of the indictment. The district court sentenced petitioner to three years in prison, fined him $30,000, and placed him on probation for a period of three years following his release from confinement (App. 728-729). The court of appeals affirmed (Pet. App. 1a-4a).

During the prosecution years, petitioner was a federal workmen's compensation representative (App. 79-80). Although he was not an attorney, he was permitted to represent injured workers in administrative proceedings before the Workmen's Compensation Board. If the decision of the Board was appealed, however, petitioner could not continue to represent the injured worker, and he would refer the case to an attorney. He handled a large number of cases involving longshoremen, and there was evidence in the record to show that it was common practice for the attorneys to whom he referred cases to agree to pay him a share of the fees ultimately payable out of the compensation award—partly as a referral fee and partly as compensation for his services in the administrative processing of the cases while they were before the Board (App. 93-96, 138-140,

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[1] "App." references are to the record appendix filed by petitioner in the court of appeals.

146-155). One of the attorneys to whom petitioner referred cases in the prosecution years was Martin Lassoff (App. 90-94).

Lassoff was called as a defense witness. Out of the hearing of the jury, Lassoff indicated that he would invoke the Fifth Amendment with respect to any questions put to him by petitioner's counsel or by the prosecution; he was excused without testifying (App. 437-438). However, on cross-examination of the special agent who examined petitioner's returns, petitioner's counsel did introduce into evidence Lassoff's recorded answers to a series of questions propounded to him when he appeared in response to a summons issued by the special agent during the investigation (App. 253, 264-281). In the course of these questions and answers, Lassoff claimed that the checks he issued to petitioner represented loans and that he believed that petitioner would be able to begin to pay back these loans in April 1976 (App. 270-275). Lassoff also stated that he had not deducted his payments to petitioner as business expense items and that he considered that the amounts paid to petitioner were still his money (App. 274-275). The government's proof established that these monetary transactions between Lassoff and petitioner occurred on a weekly basis over a three-year period, without any loan documentation or other tangible evidence showing that petitioner had the means and the intent to repay the supposed loans (App. 168-179, 250, 277).

The court of appeals affirmed. It stated that the government had introduced ample circumstantial evidence to show that the payments from Lassoff to petitioner were income and that his failure to report them was willful (Pet. App. 2a-3a). The court also rejected petitioner's contention that the trial court should have compelled Lassoff to testify (Pet. App. 3a-4a), pointing out that Lassoff had ample reason to fear that his testimony concerning his transactions

with petitioner would incriminate him. Finally, the court rejected as "singularly unpersuasive" petitioner's suggestion, made for the first time on appeal, that the trial court should have compelled Lassoff to testify by granting him limited use immunity (Pet. App. 4a). In the court's view, petitioner had no compelling need for Lassoff's testimony in view of the other parallel evidence available to him concerning the transactions, especially after Lassoff's prior recorded statements had been admitted into evidence.

ARGUMENT

1. Petitioner argues (Pet. 14-16) that the court of appeals denied him due process of law by affirming his conviction upon a theory not presented to the jury, *viz.*, that petitioner had failed to sustain the burden of showing that the payments from Lassoff were loans. But the court of appeals did not decide the case on such a theory. To the contrary, it held that there was ample evidence to support the government's contention that the payments from Lassoff represented income (Pet. App. 2a-3a). This evidence included testimony of a former partner of Lassoff that petitioner had told him that he was receiving referral fees from Lassoff and that Lassoff confirmed this arrangement, the fact that the payments from Lassoff were made on a weekly basis over a three-year period with no evidence of repayments, the absence of any loan documentation covering the transactions, and the fact that two other attorneys testified they had paid referral fees during the years in question to petitioner (App. 95, 99, 139-141, 146-150, 153-154, 168-179).

Contrary to petitioner's argument, the reference in the opinion of the court of appeals (Pet. App. 3a) to petitioner's failure to prove that the payments were loans does not adopt a theory of guilt not presented to the jury. That reference relates only to petitioner's failure to substantiate his claim with respect to the character of the payments when faced with the government's proof that the unreported

funds were taxable income. *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954); *United States* v. *Slutsky*, 487 F. 2d 832, 842 (2d Cir. 1973), cert. denied, 416 U.S. 937 (1974). Here, the government proved the receipt of unreported funds as well as the existence of circumstances from which the jury could infer that these amounts represented referral fees or the payment of compensation for petitioner's services. Having established a prima facie case of unreported income, the government satisfied its burden of proving that petitioner's returns were false and that he had attempted to evade a substantial portion of his tax liability for the prosecution years.[2] At that point it was up to petitioner, if he wished, to submit evidence that would show that the payments were loans. Since he remained silent in the face of the evidence presented, it was at his own peril, *Holland* v. *United States, supra*, 348 U.S. at 138-139. The court of appeals therefore properly affirmed his conviction as based on sufficient evidence.

2. a. Petitioner further argues (Pet. 18-27) that the trial court erred in failing to compel the production of Lassoff's

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[2]*Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), cited by petitioner (Pet. 17), are inapposite. In both of those cases, the trial court had charged the jury that the element of malice or knowing conduct necessary to establish the crime of murder could be presumed from the defendant's unlawful act of killing the victim, unless the defendant sustained the burden of persuading the jury that he lacked the requisite intent at the time of the crime. No similar infirmity exists here. The government introduced evidence with respect to every element of the crimes charged, and the trial court correctly charged the jury that the burden of persuasion rested on the government with respect to each such element (App. 603-613, 616-621). The statement by the court of appeals (Pet. App. 3a) that petitioner had failed to establish his defense places no improper burden on the defendant, but merely expresses the truism that a defendant who desires to be acquitted in the face of a strong prosecution case would be aided in his defense by adducing evidence supporting a non-inculpatory explanation of the matters proved by the prosecution.

supposedly favorable testimony. But petitioner never asked the trial court to so rule. At trial, petitioner's counsel was content with a blanket statement by Lassoff that he would invoke his constitutional privilege with respect to all questions propounded to him (App. 435-438). Although the examination of Lassoff was conducted out of the hearing of the jury, petitioner's counsel neither sought to explore the basis for Lassoff's assertion of the privilege nor asked the court to do so.

Although a court of appeals may notice "[p]lain errors or defects" in a trial even though they were not brought to the attention of the trial court (Fed. R. Crim. P. 52(b)), such notice is limited to exceptional situations involving serious errors and substantial prejudice to the party seeking to raise them for the first time on appeal. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940); *United States* v. *Jacquillon*, 469 F. 2d 380, 386 (5th Cir. 1972), cert. denied, 410 U.S. 938 (1973). Here, the court of appeals was amply justified in refusing to consider petitioner's claims of error with respect to the failure of the trial court to compel Lassoff to testify. Petitioner's counsel called Lassoff to the stand in the jury's absence and accepted his claim of Fifth Amendment privilege without attempting to probe the basis for the claim or requesting the trial court to do so (App. 436-438). Moreover, nothing in the record even remotely suggests that the testimony of Lassoff, if it had been compelled, would have been of such vital importance to petitioner as to overcome his counsel's indifference to the matter. Indeed, shortly before calling Lassoff to the stand, petitioner's trial counsel stated out of the hearing of the jury, "[w]hy should I put Mr. Lassoff on when I already have his sworn statements in the record indicating these payments were loans to * * * [petitioner]" (App. 408). As petitioner's counsel recognized, any testimony Lassoff

might have provided that these funds were loans would merely have been cumulative of his statements already before the jury. In these circusmtances, the record refutes any contention that the trial court's failure to pursue the issue sua sponte and compel Lassoff's testimony was plain error.

b. Moreover, even if petitioner had raised the issue in a timely fashion, the trial court did not err in excusing Lassoff without testifying. The circumstances of his transactions with petitioner, together with the fact that his own returns for the same years were then being examined (App. 338-341), show an adequate basis for invoking the Fifth Amendment privilege. *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951). See *Rogers* v. *United States*, 340 U.S. 367 (1951). Once he had invoked his privilege, he was properly excused.[3]

c. Finally, petitioner contends (Pet. 25-27) that Lassoff should have been granted use immunity. But petitioner's trial counsel never sought immunity for Lassoff. Rather, this claim was raised for the first time on appeal. As the court of appeals correctly noted (Pet. App. 4a), this case is hardly a " 'compelling' " one for compulsory use immunity to insure a defendant's confrontation rights "in view of the ample parallel and circumstantial evidence and the recitation in court of Lassoff's previous statements." See *United States* v. *Turkish*, 623 F. 2d 769 (2d Cir. 1980), cert. denied, No. 80-436 (Jan. 12, 1981). Lassoff's testimony

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[3]Petitioner's claim (Pet. 9, 26, 28) that the trial court induced Lassoff to assert his Fifth Amendment privilege and then refused to inquire into the basis for the claim is without merit. Lassoff was an attorney and was no doubt well aware of his rights under the Fifth Amendment. At all events, in light of the nature of Lassoff's involvement with petitioner, Lassoff's claim of privilege was not so patently groundless that the trial court could have overruled it and directed him to answer the questions of petitioner's trial counsel. *Hoffman* v. *United States*, *supra*, 341 U.S. at 486-487.

would hardly qualify as crucial exculpatory evidence. If anything, the expressed reluctance of petitioner's trial counsel (App. 408) to call Lassoff as a witness suggests that his failure to request some form of defense witness immunity may have been a deliberate trial strategy designed to avoid exposing Lassoff to cross-examination.[4] In any event, nothing in petitioner's present claim with respect to the failure of the trial court to compel Lassoff's testimony warrants review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Petitioner's claim (Pet. 27-28) that he was prejudiced by the implication in the trial court's charge to the jury that he had equal access with the government to Lassoff's books, when in fact only the government could compel their production by a grant of immunity, is without merit. The trial court, when asked by the jury why the government did not subpoena Lassoff's books, gave an entirely fair and proper answer (App. 647-648), *i.e.*, that there was no evidence before them on this point, and they were not to speculate about it. The trial court carefully kept from the jury any discussion of Lassoff's Fifth Amendment plea, and, accordingly, any reference to the power of the government to compel his testimony by granting him immunity would have been improper and would have invited the jury to speculate about matters not in evidence.

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Reply Brief of Petitioner, John Gargano.

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Table of Authorities Cited.

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Reply Brief of Petitioner, John Gargano.

The issue raised by petitioner in his petition for certiorari has been squarely met by the Government in its brief in opposition. The Government contends that in a *criminal* tax case, the prosecution satisfies its burden of proof beyond a reasonable doubt as to all the elements of the crime simply by proving the receipt of "unreported funds" plus the existence of circumstances "from which the jury *could infer* that these amounts represented" income. The Government contends that once the Goverment has proved this, "it [is] up to petitioner . . . to submit evidence that would show that the payments were not" taxable income (G.B. at 5).

The issues are thus squarely presented to this Court for review:

A) Does the Government satisfy its burden of proof in a criminal tax case by simply proving receipt of unreported funds plus "circumstances" from which the jury "could infer" that it was income? This is not the law, especially in a case — like this one — where the receipt of the funds is openly acknowledged and recorded. The Government's position would shift the burden of proof on both crucial elements of the crime: 1) that the funds *were* taxable income; and 2) that the defendant *believed* they were income and intended to defraud the Government. There is simply no evidence in the record below — and neither the Government nor the Court of Appeals cites any — proving either of these elements. The Government cannot — in a criminal case — substitute inferences and presumptions for evidence of the crucial elements of the crime. See *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

B) Even if the present Government's contention were correct — which it is not — that was not the theory on which the case was presented to the jury by the trial court. As demonstrated in the petition, the trial court's rulings — and the trial prosecutor's theory — were exactly to the contrary of the approach taken by the Court of Appeals and by the Government in this Court. The Government cannot shift its theory of the case in the appellate courts. See *Dunn* v. *United States*, 442 U.S. 100 (1979).

Accordingly, petitioner respectfully requests that the petition be granted so that these and the other important issues presented therein can be resolved.

Respectfully submitted,

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